United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76 5044

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re

INTERSTATE STORES, INC., et al.,

Debtors,

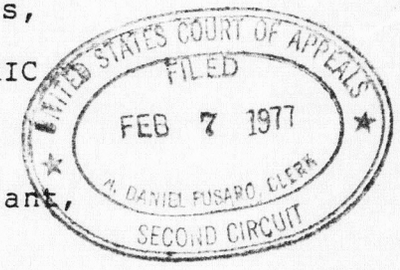
CALIFORNIA WHOLESALE ELECTRIC COMPANY, formerly known as Esgro, Inc.,

Appellant,

-against-

JOSEPH R. CROWLEY and HERBERT B. SIEGEL, as Reorganization Trustees for Interstate Stores, Inc., et al., Debtors,

Appellees.



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On Appeal from the United States District Court
For the Southern District of New York

BRIEF OF APPELLANT CALIFORNIA WHOLESALE ELECTRIC COMPANY

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Issues Presented

The issues presented by the appeal at bar are:

1. Does the order of the United States District Court for the Southern District of New York ("District Court") entered on November 24, 1976 violate the stay of all proceedings in the District Court granted by the United States Court of Appeals for the Second Circuit on November 23, 1976?

2. Assuming, arguendo, that the order of the District Court did not violate the stay granted by this Court, did the District Court err in striking and dismissing the amended proof of claim filed by California Wholesale Electric Company?

Statement of the Case

The instant appeal concerns the entry of an order by the District Court in direct contravention of a stay order issued by this Court. The precise issue pertaining to this appeal is whether the order of District Judge Lee P. Gagliardi entered on November 24, 1976 (A173)*, striking an amended proof of claim dated October 21, 1976, filed by California Wholesale Electric Company, formerly known as Esgro, Inc. (hereinafter referred to as "Esgro"), against the estates of certain of the Chapter X debtors herein (A21-29), violated this Court's order of November 23, 1976 (A172). The aforesaid order, inter alia, (a) stayed all proceedings in the District Court in connection with Esgro's controversy with White Front Stores, Inc. ("White Front"), its parent corporation, Interstate Stores, Inc. ("Interstate"), and other affiliated corporations, and (b) directed the Reorganization Trustees ("Trustees") for the Chapter X debtors and Esgro to proceed with a jury trial on their respective claims in a pending action and cross-action in the Superior Court of the State of California, County of Los Angeles. (A172).

This Court's stay was granted in response to a motion made by Esgro in connection with an appeal currently pending before this Court entitled Sulmeyer v. Crowley, et al., Docket No. 76-5034. (A172). In the aforesaid appeal, Esgro

* Numbers in parenthesis preceded by "A" refer to the joint appendix.

sought review of an order of District Judge John M. Cannella, dated September 1, 1976, which reversed the order of Bankruptcy Judge Edward J. Ryan, dated July 23, 1976, modifying the stay of actions in the Interstate Chapter X reorganization cases.

On May 11, 1976, Irving Sulmeyer, who had been appointed Chapter XI receiver for Esgro in California,* initiated an adversary proceeding in the New York Bankruptcy Court, pursuant to the Rules of Bankruptcy Procedure, against Joseph R. Crowley and Herbert B. Siegel, the Chapter X Reorganization Trustees appointed for Interstate and its affiliates, including White Front, in order to obtain a modification of the stay of actions so as to permit the continued prosecution of an action entitled "White Front Stores, Inc., et al., Plaintiffs v. Esgro, Inc., et al., Defendants; Esgro, Inc., et al., Cross-Complainants v. White Front Stores, et al., Cross-Defendants, Case No. C50105 (the "California Lawsuit"), in the Superior Court of the State of California, County of Los Angeles ("California Court") on February 15, 1973.

In an order dated July 23, 1976, Bankruptcy Judge Edward J. Ryan had modified the stay of actions so as to permit

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* During the course of the proceedings below, the Esgro Chapter XI case was confirmed by order of the United States District Court for the Central District of California. The receiver has been discharged, and all property, including the claims against White Front, et al., have revested in the debtor, Esgro, pursuant to Section 70i of the Bankruptcy Act, 11 U.S.C. §110(i).

the continued prosecution of the California Lawsuit. Thereafter, and on September 1, 1976, the order of Bankruptcy Judge Ryan was reversed by District Judge John M. Cannella. The order of District Judge Cannella provided, inter alia, that (a) reference of the Chapter X cases to Bankruptcy Judge Ryan, to the extent of the determination of the Esgro claim, was revoked, and (b) a trial of the Esgro claim would be held before the District Court.

Esgro appealed from District Judge Cannella's order of September 1, 1976. The appeal was argued on October 14, 1976. Although the Court has rendered no decision as to that appeal, upon a motion by Esgro for a stay, this Court, on November 23, 1976, issued an order staying further proceedings in the District Court and directed the parties to proceed to trial in the California Court. (A172).

Prior to this Court's November 23, 1976 decision, the Trustees filed a counterclaim against Esgro in the proceedings pending in the District Court. (A10-20). Esgro filed a reply thereto with an amended proof of claim, based upon facts ascertained during the course of pre-trial discovery. (A30-46, 21-29). On November 24, 1976, an order was entered by the District Judge granting the motion of the Trustees to strike and dismiss the amended proof of claim. (A173). No opinion was filed by the District Court.

On December 3, 1976, Esgro moved in the District Court for an order vacating its prior order of November 24, 1976. (A174-189). Esgro also requested that the District Court set forth the basis for the order of November 24, 1976. By order dated December 15, 1976, District Judge Gagliardi denied the motion of Esgro to vacate the order of November 24, 1976, and amended the order of November 24, 1976, so as to set forth the basis therefor. (A194-195). Esgro submits that the order of the District Court should be vacated in light of the stay granted by this Court and the prosecution of the claims and cross-claims between Esgro and the Trustees in the California Court. (A170-172). Issues as to the nature of the claims and cross-claims and damages flowing therefrom should be properly left to the trial court in California.

Assuming, arguendo, that the order of the District Court entered on November 24, 1976, did not violate the stay granted by this Court, the District Court erred in striking and dismissing the amended proof of claim filed by Esgro. (A173). The order of the District Court of December 15, 1976, which purports to set forth the rationale underlying the District Court's prior order of November 24, 1976, adopts in full the arguments of the Trustees that the filing of the amended claim would work "to the possible prejudice of the trustees for the debtor...." (A194-195). No plausible basis is set forth in the opinion of the District Court to support

that finding. Rather, the District Court chose to disregard the undisputed fact that the amended proof of claim is not only based on the original claim filed by Esgro, but is also responsive to the counterclaim filed by the Trustees.

This brief is submitted on behalf of Esgro in support of the instant appeal.

Statement of Facts

The facts pertinent to the appeal at bar may be summarized as follows:

1. In late December, 1970, Esgro and White Front entered into a license agreement which was later amended from time to time, whereby Esgro received the right to operate certain departments in thirty-three of the discount department stores owned by White Front located in the States of California, Washington and Oregon. Pursuant to this agreement, residential interior departments in those discount department stores were established and business was conducted therein for approximately one year. (A13, 22).

2. In late 1972, White Front announced the almost immediate closing of twenty-one of the thirty-three discount department stores. By mid-1974, the remaining discount department stores in which Esgro operated residential interior departments were closed. (A6, 26).

3. On February 15, 1973, White Front and various of its affiliates commenced the California Lawsuit, asserting 208 purported claims and seeking total damages of approximately $879,121.52 under the aforesaid license agreement.

4. On March 13, 1973, Esgro filed a petition for an arrangement under Chapter XI of the Bankruptcy Act with the United States District Court for the Central District of California (the "California Bankruptcy Court").

5. On March 19, 1973, the California Bankruptcy Court entered an order staying the continued prosecution of the California Lawsuit.

6. Thereafter, White Front filed a proof of claim in the Esgro Chapter XI case in the amount of $1,495,628.12, "plus contingent sums."

7. On April 29, 1976, the Trustees filed an amended proof of claim with the California Bankruptcy Court in the amount of $1,747,615.11, "plus contingent sums." (A12-20).

8. By order dated May 7, 1973, the California Bankruptcy Court authorized Esgro and its Chapter XI receiver, Irving Sulmeyer, to retain counsel to defend the California Lawsuit and to assert any and all claims for affirmative relief.

9. On July 27, 1973, Esgro and the other defendants in the California Lawsuit filed their answer to the complaint.

10. On July 27, 1973, Esgro and Triumph Sales, Inc. filed a cross-complaint in the California Lawsuit naming

White Front and its parent corporation, Interstate, and other affiliated corporations as cross-defendants. The cross-complaint sought compensatory damages of $30,000,000 plus punitive damages of $5,000,000. (A153).

11. Thereafter, White Front and the other cross-defendants filed an answer to the cross-complaint of Esgro and Triumph Sales, Inc.

12. On May 22, 1974, White Front and the other cross-defendants in the California Lawsuit filed petitions under Chapter XI of the Bankruptcy Act, 11 U.S.C. §§701, et seq., in the United States District Court for the Southern District of New York. (A12).

13. On June 13, 1974, the Chapter XI petitions were amended so as to comply with the provisions of Chapter X of the Bankruptcy Act, 11 U.S.C. §§506, et seq. By order dated June 13, 1974, District Judge John M. Cannella approved the Chapter X petitions and thereafter, on June 18, 1974, referred the Chapter X cases generally to Bankruptcy Judge Ryan. (A12).

14. By order dated June 13, 1974, the District Court stayed the commencement or continuation of all actions against Interstate and White Front, including the prosecution of the California Lawsuit.

15. On or about August 30, 1974, Esgro filed a claim in the Chapter X cases against the debtors named as

cross-defendants in the California Lawsuit, for the aggregate sum of $38,758,972. The claim parallels Esgro's cross-complaint in the California Lawsuit. In essence, Esgro alleged that the cross-defendants in the California Lawsuit failed to disclose to Esgro at the time it entered into the aforesaid license agreement that they had already determined to close and cease business in a majority of the White Front stores in which Esgro was to operate its concessions. (A3-9, 153).

16. On or about April 9, 1976, approximately two years subsequent to the commencement of the Chapter X cases, the Trustees filed an objection to the allowance of the claim of Esgro. The Trustees did not assert any counterclaim against Esgro, hoping that the issues would be resolved separately by the New York and California Bankruptcy Courts.

17. On May 11, 1976, Esgro commenced an adversary proceeding against the Trustees pursuant to Chapter X Rule 10-601, for the primary purpose of being able to continue the prosecution of the California Lawsuit. (A170-171).

18. On May 26, 1976, Bankruptcy Judge Ryan granted the relief requested by Esgro to the extent that (a) the parties were directed to apply to the California Court for an order advancing the trial date, (b) authorizing the commencement of discovery, (c) directing the parties to report to the Bankruptcy Court on or before July 8, 1976, concerning the

progress of pre-trial discovery and the results of their application to the California Court for an accelerated trial date. (A170-171).

19. During the course of discovery, in early July, 1976, the Trustees produced to Esgro copies of the operating statments of White Front, which Esgro had requested at the commencement of the California Lawsuit in 1973. The operating statements showed, inter alia, that when White Front and its affiliated corporations executed the license agreement with Esgro in December, 1970, they knew that their operations had sustained, for the first nine months of that fiscal year, losses in excess of $6,300,000. These losses and financial difficulties were misrepresented and were not disclosed to Esgro at the time. (A52 at ¶9, 99-100).

20. Within several days following the production of the aforesaid operating statements, depositions were commenced by the Trustees in Los Angeles, California. During the course of those depositions, counsel for the Trustees was informed that Esgro's claim would include, in substance, allegations that the financial condition of the cross-defendants in the California Lawsuit had been unlawfully misrepresented and concealed. (A99-100, 53 at ¶9).

21. On July 9, 1976, the Trustees applied to the Bankruptcy Court for an order setting down for trial the Trustees' objection to the claim of Esgro.

22. The application of the Trustees was denied by order dated July 23, 1976.

23. On July 23, 1976, the Trustees filed a notice of appeal from the Bankruptcy Court's order.

24. During August, 1970, California counsel for Esgro understood from conversations with counsel for the Trustees that the parties would mutually agree to updating their pleadings so as to permit, among other things, the updating by the Trustees of the complaint in the California Lawsuit, and the particularization and updating by Esgro of its proof of claim in the reorganization Chapter X case and the answer and cross-complaint in the California Lawsuit. (A100-102, 53 at ¶10).

25. On August 30, 1976, counsel for the Trustees informed Esgro that the Trustees would not voluntarily consent to a mutual updating of pleadings. (A101, 54).

26. On September 1, 1976, the order of Bankruptcy Judge Ryan, dated July 23, 1976, was reversed by District Judge Cannella. The order of District Judge Cannella provided, inter alia, that (a) the reference of the Chapter X cases to Bankruptcy Judge Ryan, to the extent of the determination of the Esgro claim was revoked, (b) a trial of the Esgro claim would be held before the District Court, (c) the parties were to complete discovery in connection with Esgro's $38,758,972

claim within twenty-six days,* and (d) the parties were to file a pre-trial order no later than October 12, 1976. (A170).

27. On September 2, 1976, Esgro filed a notice of appeal from the order of the District Court, dated September 1, 1976. Sulmeyer v. Crowley, et al., Docket No. 76-5034. By order of this Court, dated September 7, 1976, the application of Esgro for expedited consideration of the appeal was granted.

28. In an effort to gain needed time to conduct and complete discovery, on September 8, 1976, Esgro applied to the District Court for a suspension and stay of the order of September 1, 1976, pending this Court's disposition of the appeal. By order of the District Court, dated September 17, 1976, Esgro's application was denied. As a result thereof, and in compliance with the District Court's order of September 1, 1976, drafting began on a pre-trial order. At that time, it was contemplated by counsel for Esgro that, according to the usual procedures and standards, the pre-trial order would supersede the pleadings of the parties and that the most convenient format for updating Esgro's proof of claim would be

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* This accelerated schedule apparently suited the Trustees' purposes. The Trustees argued before this Court in connection with Esgro's appeal from District Judge Cannella's order, that even a minor delay would jeopardize the reorganization cases and they were ready for an immediate trial of the Esgro claim. By contrast, Esgro had consistently maintained that it needed time to conduct and complete discovery since most of the facts and matters to be discovered involved operations and acts of White Front and its affiliated corporations. (A103).

through particularization in the contentions and issues portion of the pre-trial order. It developed during the discussions between counsel in early or mid-October, 1976, however, that the pre-trial order might not necessarily update the pleadings. (A102 at ¶9).

29. The appeal was argued before this Court on October 14, 1976.

30. Although no decision has been rendered on that appeal, upon Esgro's motion for a stay, this Court, on November 23, 1976, stayed further proceedings in the District Court, and directed the parties to proceed in the California Court. (A172, 170-171).

31. On October 18, 1976, at a pre-trial conference held before the District Court, District Judge Cannella orally (i) directed the Trustees to file a counterclaim against Esgro, which would include and update the allegations and claims in the complaint of White Front and its affiliates in the California Lawsuit; and (ii) granted Esgro permission to file an amended proof of claim. (A102-103).

32. Prior to November 23, 1976, and subsequent to the argument of the aforesaid appeal, the Trustees filed a counterclaim against Esgro in the District Court. (A10-20).

33. Thereafter, Esgro filed a reply as well as an amended proof of claim, based upon the facts ascertained during the course of pre-trial discovery concerning the

financial condition of White Front, its parent corporation, Interstate, and other affiliated corporations, during fiscal year 1970. (A21-46). In essence, Esgro's amended proof of claim details the very same theories and same events contained in its original proof of claim. The amended proof of claim alleges that in connection with, and after, the execution of the license agreement, the cross-defendants in the California Lawsuit made misrepresentations and material omissions concerning their financial condition and intentions to expand their discount department stores during the full term of the license agreement. (A23-24).

34. On November 24, 1976, an order was entered in the District Court granting the motion of the Trustees and striking Esgro's amended proof of claim. No opinion was filed by the District Court. (A173).

35. On December 3, 1976, Esgro moved the District Court for an order vacating the order of November 24, 1976. Esgro also requested that the District Court set forth the basis for the order of November 24, 1976. (A174-189).

36. By order dated December 15, 1976, District Judge Lee P. Gagliardi denied the motion of Esgro, and amended the order of November 24, 1976, so as to set forth the purported basis therefor. (A194-195).

37. On December 27, 1976, Esgro appealed from the order of the District Court, dated December 15, 1976. (A196).

I.

THE ORDER OF THE DISTRICT COURT IS IN DIRECT CONTRAVENTION OF THIS COURT'S STAY ORDER

Pursuant to Bankruptcy Rule 921, made applicable to Chapter X cases by Rule 10-901, an order of the District Court is not effective until it has been docketed by the clerk of that court in the manner prescribed by Fed.R.Civ.P. 79(a).* Bankruptcy Rule 921 reads in pertinent part, as follows:

> "(a) Original Entry on Referee's Docket. A judgment in an adversary proceeding or contested matter shall be set forth on a separate document. Every judgment shall be entered forthwith in the referee's docket as provided in Rule 504 or, if the judgment is by the district judge, in the civil docket

* Fed.R.Civ.P. 79 provides in part, "(a) Civil Docket. The clerk shall keep a book known as 'civil docket' of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word 'jury' on the folio assigned to that action."

> as provided in Rule 7(a) of the Federal Rules of Civil Procedure. A judgment is effective only when entered as required by this subdivision." [Emphasis supplied].

"Judgment" is defined in Bankruptcy Rule 901(8)* to include an "appealable" order. See also Advisory Committee's Note to Bankruptcy Rule 921. Thus, the District Court's order of November 24, 1976 is a "judgment" within the meaning of Bankruptcy Rule 921. (A173). It is not only appealable to this Court under Section 24a of the Bankruptcy Act, 11 U.S.C. §47(a), but also relates to a "proceeding in bankruptcy" and is appealable as a matter of right. In re Meinst Co., 289 Fed. 229 (2d Cir. 1922), cert. denied, 262 U.S. 758 (1923); In re Kardos, 17 F.2d 706 (2d Cir. 1927); 2 Collier, Bankruptcy, ¶24.19 at 746-747 (14th rev. ed. 1975). Because the District Court's order, on its face, indicates that it was first filed with the clerk's office of the District Court on November 24, 1976 (A173), it could only have become effective the day after this Court stayed all proceedings in the District Court relating to Esgro's claim. (A172). Consequently, the order of the District Court violates this Court's stay order, and should be vacated.

The circumstances surrounding this Court's issuance of the stay order underscore the necessity for the vacatur of the District Court's order. As indicated previously, the stay order was issued in response to a motion made by Esgro in

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* Made applicable here by Rule 10-901.

connection with an appeal currently pending before the Court. Docket No. 76-5034. The effect of the stay order was to reverse District Judge Cannella's order of September 1, 1976. Presumably, District Judge Cannella's conclusion that "a minor delay [in proceeding to trial of the Esgro claim in the Bankruptcy Court] ... would place an undue burden on these reorganization cases,"* was outweighed by the evidence and testimony adduced at the trial in the Bankruptcy Court, which established that:

> (a) Many of the witnesses having personal knowledge of the material facts reside in California (JA 56, 57-80)**;
>
> (b) Parties to the California Lawsuit were not subject to the jurisdiction of the Bankruptcy Court (JA 57, 207);
>
> (c) A trial of the Trustees' objection to the allowance of the Esgro claim in the Chapter X case would not completely resolve all of the issues raised in the California Lawsuit and would leave unresolved the Trustees' principal claims in the California Lawsuit (JA 164);
>
> (d) The issues involved in the California Lawsuit action and cross-action were closely intertwined (JA 56);
>
> (e) California state law governed the issues between the parties; and
>
> (f) A trial by jury was available to the parties in California (JA 140).

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* Order, September 1, 1976, at 2.

** Numbers in parenthesis preceded by "JA" refer to the joint appendix filed in Sulmeyer v. Crowley et al., Docket No. 76-5034.

This Court granted Esgro's motion for a stay in order to permit one forum, the one best suited for the task, to adjudicate the entire dispute between the parties. (A172). Viewed in that context, it is readily apparent that the Court, through the stay order, intended that issues as to the nature of the claims and cross-claims should be left solely to the California Court. See In re Stanndco Developers, Inc., 534 F.2d 1050, 1053 (2d Cir. 1976), citing Callaway v. Benton, 336 U.S. 132, 142 (1949) ("Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate."). The California Court interpreted the District Court's order striking Esgro's amended proof of claim as a restriction on its jurisdiction. Consequently, the California Court refused to permit Esgro to introduce certain evidence at trial which would have established that: (1) cross-defendants misrepresented their financial condition to Esgro when they executed the license agreement in December, 1970; and (ii) Esgro would never have entered into the license agreement had it known of cross-defendants' true financial condition. The California Court also refused to instruct the jury that the cross-defendants' misrepresentations of their financial condition at the time of the execution of the license agreement could be construed as showing that cross-defendants knew they could not, and never intended to, fulfill their obligations to Esgro under their agreement.

Esgro submits that the order of the District Court entered on November 24, 1976, is void, and must be vacated in view of this Court's stay of November 23, 1976.

II.

THE DISTRICT COURT ABUSED ITS DISCRETION BY STRIKING THE ESGRO AMENDED CLAIM

Assuming, arguendo, that the District Court's order entered on November 24, 1976, does not contravene this Court's stay order of November 23, 1976, the District Court erred in striking Esgro's amended proof of claim because: (i) the amended proof of claim does not state an entirely "new" claim; and (ii) the Trustees' assertions of prejudice and inability to "defend" against the "new" allegations are unfounded. (A21-30).

A. Esgro's Amended Proof of Claim Does Not State an Entirely "New" Claim

It is well established that amendments to bankruptcy claims are to be liberally allowed. In re G. L. Miller & Co., 45 F.2d 115 (2d Cir. 1930); Scottsville National Bank v. Gilmer, 37 F.2d 227 (4th Cir. 1930); In re Lipman, 65 F.2d 366 (2d Cir. 1933); In re Marshall's Garage, 63 F.2d 759 (2d Cir. 1933); Fidelity & Deposit Co. v. Fitzgerald, 272 F.2d 121 (10th Cir. 1959), cert. denied, 362 U.S. 919 (1959).

As the court in Scottsville National Bank v. Gilmer, supra, stated:

> "[T]he trend of modern decisions is uniformly toward the greatest liberality in the allowance of the filing of amended proofs of claim, where there is anything in the record to justify such course of action." 37 F.2d at 229. [Emphasis supplied].

Similarly, this Court in In re G. L. Miller & Co., supra, indicated that:

> "[T]he trend of modern decisions is to allow great liberality in the amendment of claims in bankruptcy.... They permit amendments to correct defects of form, or to supply greater particularity in the allegations of fact from which the claim arises, or to make a formal proof of claim based upon facts which, within the statutory period, had already been brought to the notice of the trustees by some informal writing or some pleading in the bankruptcy proceedings [citing cases]." 45 F.2d at 116.

The applicable test for permitting an amendment to a proof of claim has been variously stated, but the test is whether there is any reasonable relationship between the "new" claim and the "old" claim.

Accordingly, it has been held that amendments are proper:

> "[S]o long as such amendments do not seek to assert an entirely new, different, separate and distinct claim to that which was timely asserted." In re Diversified Brokers Co., 355 F. Supp. 76 (D. Mo. 1973), aff'd, 487 F.2d 355 (8th Cir. 1973). [Emphasis supplied].

> "If the specific item in the amended claim is radically different from those in the original claim, so as to negate any contention that they relate to the same facts as the ground of liability, a bankruptcy court will not permit filing of the amended claim...." 2 Remington, Bankruptcy, §893 at 357. [Emphasis supplied].
>
> "[A]mendments are allowed if enough has been presented to show that a demand is made against the estate and that it is in the creditor's intent to hold the estate liable. In accordance with the liberality in permitting amendments, courts have been satisfied with very little that amounted to an original proof of claim." 3 Collier, Bankruptcy, ¶57 at 208 (14th rev. ed. 1975).

The aforementioned tests make it clear that Esgro's amended proof of claim is proper. The amended claim states the basic claims, on the same theories, relating to the same negotiations, contract and events as are stated in Esgro's original proof of claim. In essence, Esgro's amended claim particularizes the very same theories and events raised in Esgro's initial claim. The amended claim alleges that in connection with, and after, that same license agreement, White Front and its parent, Interstate, made representations and material omissions concerning their financial condition and intentions to expand their discount department stores during the whole term of the agreement. (A23-24 at ¶3(c), (d) and (e)). It is also alleged that the White Front representations and assurances were untrue; the specific nature

of the misrepresented financial information is set forth in Paragraph 3(g) of the amended claim. (A24-25). It is still alleged, as was in the original proof of claim, that misrepresentations were made about White Front's intent to close stores. Paragraph 7(g)(iii) of the amended claim specifically alleges that the financial operations and condition of White Front in late 1970 were deteriorating so steadily and rapidly that a substantial number, if not all, of the White Front stores would have to be disposed of or sold, and that this fact was clear or should have been clear to White Front's management when the residential interior departments agreement was signed. (A25). The same legal theories concerning the same basic events provide the foundation for both the amended claim and Esgro's initial claim. (A23 at ¶3(o)). By any reasonable test, therefore, the amended claim merely particularizes and specifies in greater detail the contentions and allegations previously made to the the Trustees by Esgro.

The court in In re Diversified Brokers Co., supra, held that even where a proposed amendment asserts a tax claim for a different tax period and embraces a different method of computation, the amendment was not "entirely new, different, separate and distinct." 355 F. Supp. at 78-79. See also In re Parcham, 166 F. Supp. 724 (D. Minn. 1958).

Moreover, a mere change in the amount of a claim does not make it a new and different claim for these purposes. In-

dustrial Commissioner of New York v. Schneider, 162 F.2d 847 (2d Cir. 1947); Fidelity Deposit Co. v. Fitzgerald, supra, 272 F.2d at 130; Continental Motors Corp. v. Morris, 169 F.2d 315, 317 (10th Cir. 1948).

It is unquestionable that both Esgro's initial claim and its amended claim deal with the same transactions and the same basic operative facts, and that they state the same theories of liability. The amended claim does not assert an "entirely new, different, separate and distinct claim." The evidence to be introduced in support of the amended claim would have been admissible to support Esgro's initial claim. Therefore, the amended claim is and was proper.

B. The District Court's Finding That The Trustees Would Be Prejudiced By The Amended Claim Is Not Supported By The Record Below

District Judge Gagliardi's refusal to vacate his order of November 24, 1976, striking Esgro's amended proof of claim, was based on his conclusion that permitting Esgro to file such claim would work "to the possible prejudice of the trustees for the debtor...." (A195) [Emphasis supplied]. In the posture of this case, however, that conclusion simply cannot be maintained, because (a) the issues and facts raised, to the extent they could possibly be found "new", have been interjected as issues for trial by the Trustees themselves; and (b) any purported "prejudice" in the Trustees' lack of

adequate discovery is attributable to their own neglect, and not to "new" pleadings.

1. The Purported "New Issues of Facts" Have Been Interjected By The Trustees Themselves.

As indicated previously, the Trustees sought and obtained leave from District Judge Cannella to file a counter-claim or complaint and did so on October 20, 1976. (A10-20). The summons attached to the complaint specifically set a trial date for November 18, 1976, as part of the trial of Esgro's claims against White Front in the District Court. (A10). This last-minute interjection of additional issues by the Trustees was certainly not requested by Esgro, and Esgro did not consent to it. Esgro was, of course, required to answer that complaint. (A30-46). The issues framed by the pleadings presumably are issues to be tried with and as part of Esgro's claim against the debtors. The answer of Esgro, in three separate affirmative defenses, specifically incorporates and includes each and every allegation of Esgro's amended claim. (A34-35). By their own doing, the Trustees have voluntarily interjected for trial all of the issues in Esgro's amended claim, and should not now be permitted to argue that those issues can only be tried on their own terms in a piecemeal manner.

2. The Trustees Have Suffered No Prejudice.

The Trustees cannot claim, as they did below, that they did not have an adequate opportunity to conduct discovery

on the purported "new" allegations. This contention was belied by the evidence presented on behalf of the Trustees in their motion to strike the amended proof of claim, and by other facts. It is clear, for instance, from the affidavit of counsel to the Trustees, submitted in support of the Trustees' motion to strike the Esgro amended claim, that:

> (1) Only in July of 1976 was Esgro first provided with the internal financial statements of White Front and Interstate which showed that they had lost substantial amounts of money. (A52 at ¶9).
>
> (2) The deposition of Francis J. Esgro was taken during that very same month, in July 1976, and it was clear from questions of counsel that "Esgro felt that certain financial information had not been provided to it." (A53 at ¶9).
>
> (3) Immediately following Mr. Esgro's deposition, the deposition of Mr. Harry Epstein was taken, and immediately following that deposition, "Esgro's counsel, ... stated ... that Esgro felt that misrepresentations had been made to it concerning

White Front's financial condition." (A53 at ¶9).

(4) Within approximately two or three weeks thereafter, in mid-August 1976, counsel for Esgro "brought up the subject of amending certain pleadings ... including the amendment by Esgro of its cross-complaint [in the California Lawsuit]." (A53 at ¶10).

(5) Counsel for Esgro understood that an agreement had been reached for such amendment. (A91-93).

There has been no legal prejudice to the Trustees because the thrust of the "amendment" had been made clear to White Front as early as possible. During the course of the initial deposition sessions in July 1976, within days after Esgro's receipt of the financial statements produced by White Front, White Front was told that Esgro considered the liability of White Front to be certain, given the misrepresentation regarding and/or omission to disclose the adverse financial condition of White Front. (A99-100 at ¶¶6 and 7). From the very beginning of the discussions and drafting of the pre-trial order in connection with the trial that was scheduled in the District Court, all of the contentions in the amended claim had been raised by Esgro. The allegations of the amended claim are substantially identical to the contentions in the

pre-trial conference order which was filed in the District Court. The Trustees have been free, at any time, to conduct any "additional" discovery they may have thought necessary after learning of the purported "new" allegations, but they chose not to do so. (A103-104 at ¶¶11-13). In fact, as late as November 5, 1976, it was suggested to the Trustees that they continue Mr. Esgro's deposition on any "new" matters if they chose to do so, but they never did. (A104 at ¶12).

The thrust of the Trustees' claim of prejudice was predicated on their failure to question Mr. Esgro on the alleged misrepresentations. (A52-53 at ¶9). In fact, the Trustees' examination of Mr. Esgro at his deposition was virtually abandoned without any substantial questioning regarding representations by White Front personnel, with counsel for the Trustees concluding that such details could be obtained through interrogatories. (A107-109). Moreover, even at Mr. Esgro's deposition, the Trustees' counsel conceded that "Esgro felt certain financial information had not been provided to it." (A53 at ¶9).

Based on the record below, therefore, the Trustees here demonstrated no prejudice, and certainly none sufficient to preclude the filing of Esgro's amended claim.

CONCLUSION

The order of the District Court of November 24, 1976, striking and dismissing Esgro's amended proof of claim, should be vacated.

Respectfully,

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Harvey R. Miller,
Bruce R. Zirinsky,
Lawrence Mittman,

Of Counsel.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re :

INTERSTATE STORES, INC., et al., :

Debtors, :

CALIFORNIA WHOLESALE ELECTRIC COMPANY, formerly known as Esgro, Inc., :

Appellant, : Court of Appeals No. 76 5044

-against- :

JOSEPH R. CROWLEY and HERBERT B. SIEGEL, as Reorganization Trustees for Interstate Stores, Inc., et al., Debtors, :

Appellees.

AFFIDAVIT OF SERVICE BY CERTIFIED MAIL

STATE OF NEWYORK)
) ss.:
COUNTY OF NEW YORK)

LAWRENCE MITTMAN, being duly sworn, deposes and says:

1. I reside at 473 F.D.R. Drive, New York, New York 10002, I am over 18 years of age, and I am not a party to the within proceedings.

2. On February 7, 1977 I served Daniel L. Carroll, Esq., Shea, Gould, Climenko & Casey, 330 Madison Avenue, New York, New York 10017, two copies of Brief of Appellant California Wholesale Electric Company and two copies of Joint Appendix in connection with the above-captioned appeal, by enclosing same in a postpaid properly-addressed wrapper, certified mail return receipt requested No. 240404, and depositing said wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the City of New York, New York.

Lawrence Mittman
Lawrence Mittman

Sworn to before me this
7th day of February, 1977

Ruth Miller
Notary Public

CERTIFICATION BY ATTORNEY

STATE OF NEW YORK, COUNTY OF

The undersigned attorney certifies that the within
has been compared by the undersigned with the original and found to be a true and complete copy.

Dated: .....

ATTORNEY'S AFFIRMATION

STATE OF NEW YORK, COUNTY OF

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is

the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: .....

INDIVIDUAL VERIFICATION

STATE OF NEW YORK, COUNTY OF ss.:

, being duly sworn, deposes and says that
deponent is the in the within action: that deponent has
read the foregoing and knows the contents thereof; that
the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF ss.:

CORPORATE VERIFICATION

, being duly sworn, deposes and says that deponent is the
of the corporation
named in the within action; that deponent has read the foregoing
and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.
This verification is made by deponent because
is a corporation. Deponent is an officer thereof, to-wit, its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF ss.:

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within
upon attorney(s) for
in this action, at
the address designated by said attorney(s)
for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.
Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF ss.:

AFFIDAVIT OF PERSONAL SERVICE

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 at No.
deponent served the within
upon
herein, by delivering a true copy thereof to h personally. Deponent knew the
the
person so served to be the person mentioned and described in said papers as the therein.
Sworn to before me, this day of 19 .....

NOTICE OF ENTRY

Sir :—Please take notice that the within is a (certified) true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.

WEIL, GOTSHAL & MANGES

Attorneys for

Office and Post Office Address

767 FIFTH AVENUE

Borough of Manhattan New York, N.Y. 10022

To

Attorney for

NOTICE OF SETTLEMENT

Sir :—Please take notice that

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.

WEIL, GOTSHAL & MANGES

Attorneys for

Office and Post Office Address

767 FIFTH AVENUE

Borough of Manhattan New York, N.Y. 10022

To

Attorney for

Index No. 76 5044 *Year* 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re
INTERSTATE STORES, INC., et al.,
Debtors,
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Appellant,
-against-
JOSEPH R. CROWLEY and HERBERT B. SIEGEL, as Reorganization Trustees for Interstate Stores, Inc., et al., Debtors,
Appellees.

AFFIDAVIT OF SERVICE BY CERTIFIED MAIL

WEIL, GOTSHAL & MANGES

Attorneys for Appellant

Office and Post Office Address, Telephone

767 FIFTH AVENUE

Borough of Manhattan New York, N.Y. 10022

PLAZA 8-7800

To

Attorney for

Service of a certified copy of the within

is hereby admitted.

Dated,

Attorney for